No. 15-274

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL.,

Petitioners,

v.

KIRK COLE, COMMISSIONER, TEXAS DEPARTMENT OF STATE HEALTH SERVICES, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF SCIENTISTS, SCIENCE EDUCATORS, SKEPTICS, THE CENTER FOR INQUIRY, AND THE RICHARD DAWKINS FOUNDATION FOR RESEARCH AND SCIENCE IN SUPPORT OF THE PETITIONERS

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BRIEF *AMICI CURIAE* OF SCIENTISTS, SCIENCE EDUCATORS, SKEPTICS, THE CENTER FOR INQUIRY, AND THE RICHARD DAWKINS FOUNDATION FOR RESEARCH AND SCIENCE IN SUPPORT OF THE PETITIONERS

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Scientists, science educators, and skeptics[2] across the world are concerned with the spread of pseudoscience in the court system. These individuals, from a broad range of fields are committed to preserving the role of science in society. They share a common desire to ensure that scientific testimony presented to courts is accurate and reliable. The Center for Inquiry ("CFI"), with whom many of these individuals are associated, therefore presents this brief on their behalf, as well as on its own behalf, and on behalf of the Richard Dawkins Foundation for Reason & Science, which has cosigned. The individual scientists, science educators, and skeptics, including professors, writers, and science advocates, who have chosen to sign onto this brief are listed in the Appendix.

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[1] The state of Texas and the Center for Reproductive Rights, as counsels of record for the parties, have granted written consent for this brief for be filed; this consent is also on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] A skeptic is one who holds that our beliefs should conform to the evidence, and that the scientific method, in most situations, represents the best method of generating reliable evidence.

CFI is a nonprofit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the spread of pseudoscience, including activities that masquerade as involving scientific technique, but which are, instead, methodologically flawed or fundamentally tainted with bias, has damaging effects on society, depriving both the courts and legislators of the accurate, independent, and reliable information necessary for them to do their jobs.

CFI's mission has led it to work consistently to expose purported scientific expertise that fails to adequately follow the scientific method and represents, instead, pseudoscience. Illustrative of its work is The Credibility Project, a project analyzing the credibility of the 687 individuals with purported climate science expertise who informed the United States Senate Minority Report on Global Warming.[3] The work done by the project exposed the fact that of the alleged experts, more than 80% had no peer reviewed published work on climate science. CFI, through its program, the Committee for Skeptical Inquiry, has led the way in persuading the Associated

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[3] CENTER FOR INQUIRY OFFICE OF PUBLIC POLICY, THE CREDIBILITY PROJECT: AN ASSESSMENT OF THE "U.S. SENATE MINORITY REPORT: MORE THAN 650 INTERNATIONAL SCIENTISTS DISSENT OVER MAN MADE GLOBAL WARMING CLAIMS." (July 2009), *available at* http://www.centerforinquiry.net/uploads/attachments/credibility__brochure.pdf (last visited December 27, 2015).

Press to stop calling those who deny climate change "skeptics."[4]

CFI's work in countering pseudoscience and promoting skepticism has also led it to launch its campaign, "Keep Healthcare Safe and Secular."[5] This campaign seeks to ensure that the delivery of appropriate health care is not obstructed or denied by policies, practices, and beliefs which incorporate pseudoscience. As part of this campaign, CFI works to counter the spread of pseudoscience, including misinformation regarding the benefits and risks of vaccination and the use of ineffective and potentially dangerous "complementary and alternative medicine."

CFI represents a community of skeptics, including scientists, scholars, and laypersons, from across the United States and the world. CFI and the cosigners to this brief have a strong interest in this Court's determining that pseudoscientific opinion cannot take the place of accurate, reliable, scientific evidence. Such a determination will not only protect the integrity of science, but also that of the legal system. The negative impacts of pseudoscience promoted to serve the interests of some industry and political groups will be significantly minimized, protecting both the law and individual rights from their detrimental influence.

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[4] Zoe Schlanger, *The Real Skeptics Behind The AP Decision To Put An End To The Term 'Climate Skeptics*, NEWSWEEK, Sept. 24, 2015 *available at* http://www.newsweek.com/associated-press-climate-skeptic-climate-denier-stylebook-center-skeptical-376197 (last visited December 27, 2015).

[5] *Keep Healthcare Safe And Secular: A Center For Inquiry Campaign*, *available at* http://www.safeandsecular.org/ (last visited December 27, 2015).

The Richard Dawkins Foundation for Reason & Science is a nonprofit organization headquartered in Washington, D.C., with a mission to promote scientific literacy, remove the influence of religion in science education and public policy, and eliminate the stigma that surrounds atheism and non-belief.

SUMMARY OF ARGUMENT

In recent federal court litigation concerning abortion restrictions that purport to protect women's health, the states defending these laws have paid a small group of so-called expert witnesses hundreds of thousands of dollars to testify that admitting privileges requirements and ambulatory surgical center ("ASC") requirements—including the ones at issue in this case—enhance the safety and continuity of care for abortion patients. To a person, each of these experts has been discredited in their testimony concerning admitting privileges requirements, which testimony was afforded little, if any, weight by the district court judges—including Judge Yeakel below—who presided over the trials in these cases.

Notwithstanding the various states' attempts to keep his participation secret, it emerged at each of these trials that these witnesses had been closely managed behind the scenes by a single man: Vincent Rue. The states' reluctance to disclose Dr. Rue's involvement was not surprising. As explained below, Vincent Rue has a long history as an anti-abortion advocate *and* as a discredited expert witness in abortion cases. When his own reputation as an expert witness had been tarnished, he moved into a consulting role. In the past five years alone, he has made over $185,000 coordinating expert witness testimony for states defending abortion restrictions,

including in admitting privileges requirements cases in Texas, Alabama, and Wisconsin.[6]

This Court has a duty to independently examine the facts of cases before it where constitutionally guaranteed rights are at issue. *Gonzales v. Carhart*, 550 U.S. 124, 164 (2007). In the present case, the Court of Appeals for the Fifth Circuit revisited the record of the district court, referencing the testimony of the State's expert witnesses and completely ignoring the district court's findings regarding the lack of credibility of those witnesses and the weight which should be placed upon their testimony. This group of expert witnesses, including Dr. John M. Thorp, Jr., Dr. James Anderson, and Dr. Peter Uhlenberg, under the coordination of Dr. Vincent Rue, has been travelling the country testifying in abortion restriction cases. Their pseudoscientific testimony, designed only to manufacture a controversy regarding the need for such restrictions, rather than provide scientific support for them, has been found by district courts to be flawed. In every case where they have testified regarding the impact of admitting privilege requirements they have been discredited by the trial court.

Such manufactured controversy cannot be used to restrict constitutionally protected rights. Indeed, this Court has been faced with manufactured controversy and pseudoscience before and has rejected it. In the debate over the right of same sex couples to marry, the states' denial of the benefits of marriage to same sex

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[6] Sharona Coutts and Sofia Resnick, *RH Reality Check: False Witnesses: Vincent M. Rue available at* http://rhreality check.org/false-witnesses/#vincent-m-rue (last visited December 27, 2015).

couples was often defended by pointing to research allegedly finding that children were harmed by being raised in households with same sex parents. *E.g.* Brief of the Family Trust Foundation of Kentucky as Amicus Curiae Supporting Respondents at 15-28, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-566). Evidence was presented demonstrating that no such harm to children existed, and, instead, children were harmed by same sex couples being denied the right to marry. *E.g.* Brief of American Psychological Association *et al.* as Amici Curiae Supporting Petitioners at 18-30, *Obergefell v. Hodges*, 135 S. Ct. 2584. (2015) (No. 14-556) In its review of the evidence, this Court refused to grant wide discretion to the states to accept the existence of testimony on both sides as being indicative of a genuine scientific controversy. *See Obergefell*, 135 S. Ct. at 2600 ("Marriage also affords the permanency and stability important to children's best interests."); *see also United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (The Defense of Marriage Act "humiliates tens of thousands of children now being raised by same-sex couples. [It] makes it even more difficult for the children to understand the integrity and closeness of their own family.").

The same principles apply here: decisions that impact fundamental constitutional rights must not be made on the basis of false, unreliable, pseudoscientific evidence. Manufactured controversy does not require courts to grant legislators deference to enact laws which restrict access to constitutional rights. If pseudoscientific evidence becomes acceptable within our legal system, the courts will be unable to fulfill their central role as defenders of our cherished constitutional rights. If this is permitted to occur, it can only serve to undermine the rule of law and the public's faith in the judicial system.

ARGUMENT

I. COURTS HAVE A DUTY TO ENSURE THEIR DECISIONS ARE BASED ON ACCURATE SCIENTIFIC EVIDENCE AND TO ESCHEW PSEUDOSCIENCE

Judges are rarely scientists by profession, let alone trained in the specific medical or biological questions that often arise in litigation. Therefore, judges routinely rely on the testimony of witnesses with expertise in a body of specialized knowledge to apply the relevant law to a given set of facts.

Science is the intellectual and practical activity encompassing the systematic study of the structure and behavior of the physical and natural world through observation and experiment. Scientists approach any situation with an open mind. They observe the situation, formulate hypotheses about it, and test those hypotheses with experiments. Where the results of the experiment do not conform to the expected results predicted by the hypothesis, then the hypothesis must be reexamined. This is the central nature of science – it is determined by results, not preconceived ideas.

Pseudoscience, on the other hand places the cart before the horse. It predetermines the desired result, and then seeks evidence for it. When the evidence does not support the desired outcome, that evidence is manipulated and altered. Pseudoscience portrays itself as following the scientific method, but in fact represents the antithesis of science. It dresses itself in the garb of science, and draws on the credibility science has earned. However, it is agenda driven, seeking only to provide justifications for predetermined outcomes.

Pseudoscience is marked by a series of common strategies that can be seen as placing it outside the realm of science, and into the realm of agenda driven presupposition and misrepresentation of facts. These strategies of those who promote pseudoscientific evidence to manufacture false controversies include "(1) the use of mercenary scientists, (2) the use of cherry-picked data and manipulation of statistical methods, (3) the manufacture and promotion of doubt and uncertainty, and (4) the use of rhetoric to manufacture controversy in addition to uncertainty." Jane Moreno & Brian Holmgren, *Dissent Into Confusion: The Supreme Court, Denialism, And The False "Scientific" Controversy Over Shaken Baby Syndrome*, 2013 Utah L. Rev. 153, 154 (2013) *citing* Leah Ceccarelli, *Manufactured Scientific Controversy: Science, Rhetoric, and Public Debate*, 14 Rhetoric & Pub. Affairs 195, 197 (2011).

This is why, in its landmark decision, *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 590 (1993), this Court determined that the trial court serves a fundamental role as a gatekeeper when it comes to the use of expert testimony at trials. Where cases involve the use of expert testimony, it is of critical importance that the qualifications of the witnesses are rigorously vetted and that the testimony itself is relevant, reliable, and based on methodologically sound research methods.

II. THE EXPERT EVIDENCE SUBMITTED IN SUPPORT OF THE ADMITTING PRIVILEGES REQUIREMENTS HAS BEEN PROPERLY DISCREDITED BY MULTIPLE FEDERAL COURTS

The State of Texas, in its defense of its regulation of abortion providers under Tex. Health & Safety Code

Ann. § 171.0031,[7] provided a series of expert witnesses to testify to questions of medical and scientific fact. Defendants-Appellees' expert witnesses offered testimony in the following areas:

- that requiring doctors who provide first-trimester medication and surgical abortion services to maintain active admitting procedures at hospitals within 30 miles of the abortion clinic was necessary to ensure continuity of care in the rare event of a complication;
- that requiring doctors who provide first-trimester medication and surgical abortion services to provide these services in hospital-level operating rooms within ASCs was essential to protect patient health and safety;
- that the undisputed effect of the admitting-privileges and ASC requirements—to close over three-quarters of the clinics throughout Texas and reduce statewide capacity for the provision of abortion services—would not impose a substantial burden or undermine the health of women seeking abortions in Texas.

As discussed below, in discrediting these witnesses and their testimony, the district court in this case joins every other federal district court to consider these issues at trial. As such, in the absence of any credible evidence justifying the admitting-privileges and ASC requirements and in view of the deference owed the

[7] These regulations were enacted on July 18, 2013, as part of an omnibus abortion regulation statute known as HB2.

district court's factual findings, the Texas laws cannot stand.

A. Dr. Vincent Rue

Though he did not himself testify, the principal architect of the State's expert testimony in this case is Vincent Rue. Dr. Rue received a Ph.D. in human development and family studies from the University of North Carolina School of Home Economics in 1975.[8] However, he has in prior cases asserted an area of expertise in the field of the impact of abortions upon women.[9] Dr. Rue opposes abortion in all instances.[10]

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[8] *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1333 (E.D. Pa. 1990), *aff'd in part, rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992); *see also* National Office of Post-Abortion Reconciliation and Healing, *Reclaiming Fatherhood: A Multifaceted Examination Of Men Dealing With Abortion* (2007), *available at* http://www.menandabortion.info/bio-vincent.html (last visited December 27, 2015).

[9] *Casey*, 744 F. Supp. at 1333 ("Dr. Vincent M. Rue testified at trial as an expert in the areas of problem pregnancy decision-making, marital family relationships, and psychological effects following an abortion.").

[10] In his testimony to the trial court in *Casey*, 744 F. Supp. 1323, Dr. Rue stated that abortion following incest or marital rape was "failure," and a raped woman terminating her pregnancy was performing "capital punishment on the fetus." Dick Cowan, *Witness Defends Abortion Law*, THE MORNING CALL, Aug. 1, 1990 *available at* http://articles.mcall.com/1990-08-01/news/2759635_1_dr-vincent-m-rue-post-abortion-abortion-control-act (last visited December 27, 2015). In a 1981 report to the United States Senate, Dr. Rue said that abortion "re-escalates the battle between the sexes" and "increases bitterness towards men." Molly Redden, *Texas Pays 'Thoroughly Discredited' Expert $42,000 To Defend Abortion Law*, MOTHER JONES, Aug. 13, 2014 *available at* http://www.motherjones.com/politics/2014/08/texas-vincent-rue-anti-abortion-law (last visited December 27, 2015).

Dr. Rue has more recently been claimed to be an expert not in the field of abortion, but instead in the area of abortion *litigation*. He was hired by the State of Texas to coordinate the expert witness testimony for the Defendants-Respondents in this case. ROA. 1824. He was similarly hired by the states of Alabama and Wisconsin to coordinate the expert witness testimony for the same type of litigation.[11] Despite his recognized lack of training in medicine or sociology, Dr. Rue researched and drafted expert testimony that was then offered as evidence by anti-abortion physicians and social scientists. However, in every case where his evidence was considered by a district court judge fulfilling the judicial gatekeeping function in an admitting privileges case—including Judge Yeakel below—Dr. Rue's involvement was uncovered, despite the efforts of the various states to hide it, and the testimony offered by his witnesses largely, if not entirely, discredited. *Whole Woman's Health et al. v. Lakey,* 46 F. Supp. 3d 673, 680 n.3 (W.D. Tex. 2014), *rev'd in part*, 790 F. 3d 563 (5th Cir. 2015); *Planned Parenthood v. Van Hollen*, 94 F.Supp. 3d 949, 973 n.24 (W.D. Wis. 2015), *aff'd*, 806 F.3d 908 (7th Cir. 2015); *Planned Parenthood v. Strange*, 33 F. Supp. 3d 1381, 1386-87 (M.D. Ala. 2014) (*Strange I*).[12]

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[11] Katie McDonough, *Meet The 'Thoroughly Discredited' Expert Defending Texas' Sweeping Abortion Law*, SALON, Aug. 13, 2014, *available at* http://www.salon.com/2014/08/13/meet_the_thoroughly_discredited_expert_defending_texas_sweeping_abortion_law/ (last visited December 27, 2015).

[12] Even other abortion opponents have dismissed Dr. Rue's expertise. For example, in 1987, Dr. Rue was serving as special consultant to Surgeon General C. Everett Koop's Office on Abortion Morbidity. In that role, Dr. Rue submitted a white paper to Congress on Post-Abortion Syndrome which was subsequently

When the State claimed Dr. Rue's communications with its witnesses were not discoverable, a magistrate judge in this case found that Dr. Rue was not an expert at all. He held that:

> [I]n considering the facts of this case, a major obstacle for the Court was that State Defendants were never able to precisely identify Rue's role in the litigation. The evidence before the Court demonstrates that State Defendants have attempted to characterize Rue as a consulting expert, agent, and consultant. When the Court inquired precisely what duties Rue had in this case, State Defendants responded with a variety of tasks, including facilitating communications between the testifying experts and the State's counsel, "polishing" the testifying experts' reports, and identifying the experts themselves. Additionally, State Defendants also represented that Rue was an expert "in this kind of litigation" ... [A]lthough the precise nature of Rue's involvement is unclear, the Court can conclude that Rue is not an "expert" (consulting or otherwise) as understood pursuant to the Federal Rules of Civil Procedure based upon State Defendant's description of Rue's role in this case. Indeed, State Defendants no longer appear to argue that Rue is an "expert" in any capacity with regard to this case.

Whole Woman's Health v. Lakey, 301 F.R.D. 266, 271 (W.D. Tex. 2014).

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disavowed by Koop, himself a staunch opponent of abortion. Cowan, *supra*. Note 10.

Prior to working behind the scenes as a consultant, Dr. Rue attempted to serve as an expert witness himself in support of abortion restrictions, but his qualifications and testimony were routinely discounted. For example, in *Hodgman v. Minnesota*, 648 F. Supp. 756, 768 (D. Minn. 1986), *rev'd* 853 F. 2d 1452 (8th Cir. 1988), *aff'd*, 497 U.S. 417 (1990), Judge Alsop of the District Court of Minnesota found that "Rue possesses neither the academic qualifications nor the professional expertise of plaintiffs' expert witnesses. More importantly, his testimony lacked the analytical force of contrary testimony offered by plaintiffs' witnesses." In *Casey*, Judge Huyett of the District Court of the Eastern District of Pennsylvania wrote regarding Dr. Rue's research: "After submission for peer review by scientists with the Center for Disease Control, the National Center for Health Statistics and other scientific institutions, his study was found to have 'no value' and to be 'based upon a priori beliefs rather than an objective review of the evidence.'" 744 F. Supp. at 1333. Judge Huyett rejected Dr. Rue's testimony noting:

> [b]ecause Dr. Rue lacks the academic qualifications and scientific credentials possessed by plaintiffs' witnesses, I conclude that his testimony, which is based primarily, if not solely, upon his limited clinical experience, is not credible. His testimony is devoid of any of the analytical force and scientific rigor which typified the testimony of plaintiffs' expert psychologist.

Id. at 1333-34. *See also Planned Parenthood v. Verniero*, 22 F. Supp. 2d 331, 342 (D. N.J. 1988), *aff'd*, 220 F. 3d 127 (3d Cir. 2000) ("Dr. Rue's testimony is irrelevant and unnecessary.").

Rather than testifying directly, Dr. Rue now acts as a consultant, working with states to ensure passage of laws regulating abortion providers and seeking to defend those laws against constitutional challenge. In this role, Dr. Rue, through his consulting firm Rue & Stanford-Rue P.A., has worked with Alabama, Alaska, North Dakota, Kansas, Texas, and Wisconsin defending various abortion restrictions, receiving in excess of $190,000.[13] *E.g. Aid for Women v. Foulston*, 427 F. Supp. 2d 1093, 1110 n.14 (D. Kan. 2006), vacated as moot, 2007 U.S. App. LEXIS 30757 (10th Cir. Sept. 20, 2007) ("Dr. Rue was hired by the Attorney General's office to work in some manner on this case, although the exact nature of his involvement was not fully explained. From the testimony, it is clear that Dr. Rue was involved significantly in assembling the team of defendants' experts, though he himself did not testify."). Through this position, Dr. Rue has used the qualifications of other witnesses to proffer his opinions as expert testimony. To date, no trial court has accorded these witnesses or their testimony any meaningful weight when evaluating restrictions such as the admitting privileges requirements central to this case.

In the case below, Judge Yeakel chastised the State for trying to hide the level of influence Dr. Rue had in preparing their expert witnesses. *Whole Woman's Health*, 46 F. Supp. 3d at 680 n.3. Texas initially sought to conceal these links; however, the depth of Dr. Rue's involvement became apparent after Plaintiffs-Appellants won a motion to compel disclosure of communications between Dr. Rue and the State's expert witnesses. *Whole Woman's Health*, 301

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[13] Coutts and Resnick, *supra* note 6.

F.R.D. at 268; ROA. 1578-89. In fact, after those communications were finally turned over to Plaintiffs-Appellants' counsel when Defendants partially complied with the court's order, ROA. 2488, [14] four out of the State's five expert witnesses were forced to revisit their testimony on the stand when confronted with emails suggesting they had misrepresented Dr. Rue's role in writing their expert reports.[15] (A sixth expert, Dr. John Thorp, was withdrawn by Defendants-Appellees altogether. *See infra* II C). On the stand, Dr. Mayra Thompson, an OB/GYN testifying to rebut the clinics' medical expert, denied Dr. Rue had drafted her report. ROA. 3106. But an email revealed Dr. Rue's telling her "I am still drafting and will keep you posted." ROA. 3115. Attached to the email was the plaintiff's expert's report—Dr. Rue had drafted Dr. Thompson's report before she had ever seen the report she was rebutting. *Id.* When Dr. Thompson asked in a subsequent email if she should add comments after reading the plaintiffs' report, Dr. Rue told her, "No." ROA. 3116. Dr. Thompson did attempt to make some contribution to the report submitted to the court under her name, but Dr. Rue had little use for input from an actual medical doctor, writing "I tried to use as much of your material as I could, but time ran out." ROA. 3118. At her deposition weeks after Dr. Rue had submitted Dr. Thompson's final report to the Attorney General's Office, Dr. Thompson admitted that she had not read eight of the

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[14] The State here only produced emails where Dr. Rue started the email chain, not emails sent to Dr. Rue by the witnesses.

[15] ROA. 3106-23 (Dr. Thompson); ROA. 3145-62 (Dr. Anderson); ROA. 3256-64 (Dr. Kitz; ROA. 3328-41 (Dr. Uhlenberg)

nine studies relied upon by the expert she claimed to be rebutting. ROA. 3132.

Correspondence between Dr. Rue and Dr. Sandra Kitz, a witness testifying as an expert in the management of medical facilities, also shows a report in progress before its purported author had read the report to be rebutted. Dr. Kitz wrote to Dr. Rue, "I see 'my' report that you returned to me yesterday references my review of a report from a Dr. Layne-Farrar.... *I've never seen that report.*" ROA. 3262. Dr. Kitz, who had stated under oath that no one else had contributed to the writing of her report, ROA. 3256, tried to minimize Dr. Rue's involvement saying he had only helped with her draft, but an email showed her "draft" consisted of nothing more than a few bullet points sent to Dr. Rue. ROA. 3257-58.

Judge Yeakel was "dismayed" by the State's efforts to hide Dr. Rue's involvement:

> The credibility and weight the court affords the expert testimony of the State's witnesses Drs. Thompson, Anderson, Kitz, and Uhlenburg is informed by ample evidence that, at a very minimum, Vincent Rue, Ph.D., a non-physician consultant for the State, had considerable editorial and discretionary control over the contents of the experts' reports and declarations. This court finds that, although the experts each testified that they personally held the opinions presented to the court, the level of input exerted by Rue undermines the appearance of objectivity and reliability of the experts' opinions. Further, the court is dismayed by the considerable efforts the State took to obscure Rue's level of involvement with the experts' contributions.

Whole Woman's Health, 46 F. Supp. 3d at 680 n.3.

In *Van Hollen*, 94 F.Supp. 3d at 973, n.24. Judge Conley of the Western District of Wisconsin was similarly critical of Dr. Rue's outsized role in that case. While critiquing the testimony of one of the State's expert witnesses, Dr. James G. Linn, the judge wrote that the

> weight to be given to Dr. Linn's testimony was also called into question given that he, like most of defendants' other experts, had been actively recruited by Dr. Vincent Rue, an advocate of abortion regulations who has been discredited by other courts because of his lack of analytical rigor and possible personal biases."

Id.

Judge Conley went on to find that "Rue ghost wrote or substantively edited portions of some defendants' experts' reports, including [...] Dr. Linn's. As a result, Dr. Linn could not explain at trial the intended meaning of some parts of his own report." *Id.* In *Strange I*, 33 F. Supp. 3d at 1386-87, Judge Thompson of the Middle District of Alabama reached a similar conclusion about Dr. Rue's involvement in that case. A comparable pattern of over involvement by Dr. Rue in the production of expert testimony on behalf of Dr. James Anderson was noted, and criticized, at the district court below by Judge Yeakel. *See infra* §II B.

Thus, Judge Yeakel correctly refused to permit Dr. Rue to hide behind the credentials of other witnesses in order to dress his unqualified and unsubstantiated testimony in the garb of more credible evidence. *Whole Woman's Health*, 46 F. Supp. 3d at 680 n.3.

B. Dr. James Anderson

Dr. James Corr Anderson is board certified in both family medicine and emergency medicine, although he has not practiced emergency medicine for the last ten years. ROA. 487. He has testified in defense of regulations restricting the provision of abortions in Alabama, Alaska, North Dakota, Wisconsin, and, in this current case, in Texas. ROA. 3145-46.[16] His testimony primarily focused on the purported benefits of requiring all physicians who perform abortions to obtain admitting privileges at a local hospital. He is a longtime leader of multiple organizations which advocate for abortion to be illegal in the United States in all instances. ROA. 522-524. However, the problems with Dr. Anderson's expert testimony go significantly beyond the question of bias.

As noted, *supra*, Judge Yeakel found that Vincent Rue had exercised "considerable editorial and discretionary control over the contents" of Anderson's testimony that admitting-privileges requirements enhance patient safety and further continuity of care, which discredited Anderson's testimony. *Whole Woman's Health*, 46 F. Supp. 3d at 680 n.3. While Dr. Anderson claimed in his testimony that he wrote his testimony as part of a "team" with Dr. Rue, he acknowledged that when a dispute arose between him and Dr. Rue about whether to offer an opinion, Dr. Rue was allowed to "overrule" him. ROA. 3151 (Dr. Anderson wrote in an email to Dr. Rue, "Vince, I think this is redundant, but you can overrule me."). Dr.

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[16] *See also* Sharona Coutts and Sofia Resnick, *RH Reality Check: False Witnesses: Dr. James C. Anderson available at* http://rhrealitycheck.org/false-witnesses/#james-c-anderson (last visited December 27, 2015).

Anderson was apparently unaware of some of the changes Dr. Rue had made in the written testimony submitted under Dr. Anderson's name. For example, an exhibit to his testimony, created by Dr. Rue, had later been removed by Dr. Rue without informing Dr. Anderson, who testified "[i]t's supposed to be attached ... the fact that it's not there is a surprise to me." ROA. 3159-61.

Likewise, in *Strange I*, 33 F. Supp.3d at 1386-88, Judge Thompson of the Middle District of Alabama roundly criticized Dr. Rue's role in writing Anderson's testimony. For example, through questioning on the stand, Judge Thompson discovered that one of the expert reports submitted by Dr. Anderson had been written *entirely* by Dr. Rue, and that Anderson had not even reviewed the document before signing it. *Id.* at 1386-87. According to the court, there were:

> three explanations for Anderson's willingness to sign his name to a report written by a man about whom he knows so little, to do so without even checking its contents, and then to represent the opinions in it as his own: either he has extremely impaired judgment; he lied to the court as to his familiarity with Rue; or he is so biased against abortion that he would endorse any opinion that supports increased regulation on abortion providers. Any of these explanations severely undermines Anderson's credibility as an expert witness.

Id. at 1388. As a result, Judge Thompson did not find any of his opinions to be credible:

> except where they were "statements against interest," that is, statements which would

> tend to support the plaintiffs' arguments. To the extent that Anderson was dishonest or unduly biased, these statements would be least likely to be colored by that dishonesty or bias. To the extent that his judgment is questionable, the court credited his opinions only where they confirmed the statements or practices of other witnesses.

Id.

In his decision in the Wisconsin case, Judge Conley likewise discounted Anderson's evidence and repeatedly expressed concern over his credibility. *Van Hollen*, 94 F. Supp. 3d at 974 n.24; *id.* at 976, n.27 ("Furthermore, Dr. Anderson, like Dr. Thorp, has been retained to provide testimony in several cases concerning abortion regulations, including similar challenges to admitting privileges requirements. The court shares the same concern it has with Dr. Thorp in light of Dr. Anderson's extensive involvement in lawsuits supporting abortion regulations.").

C. Dr. John M. Thorp, Jr.

Dr. Thorp is a Professor of Obstetrics and Gynecology at the University of North Carolina-Chapel Hill School of Medicine, and a Professor in the department of Maternal and Child Health at UNC's School of Public Health. ROA. 558. Dr. Thorp has regularly provided testimony on the importance of abortion providers maintaining admitting privileges at nearby hospitals to protect public safety, testifying as an expert witness in abortion cases in Alabama, Wisconsin, Louisiana, Mississippi, and Texas.[17] Dr.

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[17] *See* Sharona Coutts and Sofia Resnick, *RH Reality Check: False Witnesses: Dr. John M. Thorp, Jr. available at*

Thorp's work, however, is fundamentally flawed, and has been criticized by federal judges. In this case Dr. Thorp provided testimony but he was withdrawn as a witness after the State finally produced his communications with Dr. Rue.

Once the full involvement of Vincent Rue in the testimony given by expert witnesses in this case was revealed, after the district court required production of the email correspondence between Dr. Rue and the witnesses, the State withdrew Dr. Thorp as a witness despite having earlier listed him as a witness for the defense. ROA. 1977. Dr. Thorp did, though, testify at both the Alabama and Wisconsin trials. One of the primary concerns the district court judges in those cases expressed about his testimony was a blatant and critical error in Dr. Thorp's own research regarding abortion safety and complication rates. Indeed, even though he was confronted about – and conceded – this error on multiple occasions, he continued to assert his erroneous claims. *Strange I*, 33 F.Supp. 3d at 1394. Relying on his own article concerning complication rates from abortion, Thorp had opined that existing literature placed the complication rate from abortion in the U.S. at 2-10 percent. *Id.* However, at his November 2013 deposition in the Alabama case, Thorp admitted this was error: the low-end number should have been 0.2%. *Id.* Yet in April 2014, he submitted another declaration to the district court in Alabama reiterating the incorrect 2% figure. *Id.* In June 2014, at the Wisconsin trial, Dr. Thorp was once again forced to admit the claimed 2% bottom range was dramatically inflated by a factor of ten, acknowledging the real figure should have been 0.2%. *Van Hollen*, 94

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http://rhrealitycheck.org/false-witnesses/#john-m-thorp (last visited December 27, 2015).

F. Supp. 3d at 968. Dr. Thorp "failed to cite any support in his report for this extremely broad variation in probable outcomes range." *Id.* As for the higher end of the range, Dr. Thorp further admitted on the stand that his calculations had actually given a top figure of 7%, but he had chosen to increase this to 10% (an increase of over 40%) in order to account for alleged under-reporting by abortion providers.[18]

As Judge Thompson put it "[i]n his testimony about complication rates, Thorp displayed a disturbing apathy towards the accuracy of his testimony," *Strange I*, 33 F. Supp. 3d at 1394, and the "choices that he made in developing his estimates seemed to be driven more by a bias against abortion and a desire to inflate complication rates than by a true desire to reach an accurate estimate of the dangerousness of abortion procedures." *Id.*

Even apart from the mistakes noted above, Dr. Thorp's methodology overall was described by Judge Conley as "lack[ing] analytical rigor." *Van Hollen*, 94 F. Supp. 3d at 969. Judge Conley found Dr. Thorp's testimony "often came off more as advocacy than expert opinion" and found "little to credit in Dr. Thorp's opinions of the relative risks of abortion to childbirth." *Id.* Overall, he dismissed Dr. Thorp's testimony as biased and unreliable, explaining:

> The court has several concerns with Dr. Thorp's credibility. First Dr. Thorp has not only been retained in a number of cases to provide testimony supporting abortion regulations, including similar challenges to admitting privileges requirements, but has

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[18] Coutts and Resnick, *supra* note 17 (describing Dr. Thorp's testimony regarding complication rates).

> also submitted amicus curiae briefs *on his own behalf* to the U.S. Supreme Court in support of abortion-related regulations. His extensive involvement in lawsuits supporting abortion regulations calls into question his ability to separate personal beliefs from the medical science surrounding these regulations. Second, the court's general concern about Dr. Thorp's ability to be objective is supported by certain hyperbolic statements in his report, as well as by the argumentative nature of his contributions during the colloquy with the court.

Id. at 967 n.16 (emphasis in original).

Finally, after dismissing Dr. Thorp's testimony on complication rates, Judge Thompson also discredited Thorp's testimony regarding continuity of care. While noting that Thorp was "the strongest proponent at trial" of requiring every physician that performs outpatient procedures to obtain admitting privileges at a local hospital, Judge Thompson also noted that

> Dr. Thorp testified that, at his own office, he removes tissue that remains after early-term miscarriages, presumably using the dilation and curettage method, which is identical to early-term surgical abortion. He also performs other procedures which carry risks of serious complications. But Dr. Thorp *does not maintain staff privileges to perform gynecological surgery* at any hospitals.

Planned Parenthood v. Strange, 33 F. Supp. 3d 1330, 1372 (M.D. Ala. 2014) (*Strange II*) (emphasis in original). The court found this hypocrisy telling. "This inconsistency between what he says and what he does

led the court to give his opinions extremely limited weight." *Strange I*, 33 F. Supp. 3d at 1394.

In the Louisiana case, Dr. Thorp wrote an expert report, and was deposed. He, however, never appeared at trial. Plaintiffs' Witness List, *June Med. Serv. LLC v. Kliebert*, 2015 U.S. Dist. LEXIS 61699 (M.D. La. May 12, 2015). In the Mississippi case, he wrote a report as an expert witness opposing the granting of a preliminary injunction. Declaration of Dr. John M. Thorp, Jr. in Opposition to Plaintiff's Motion for Preliminary Injunction, *Jackson Women's Health Org. v. Currier*, 878 F. Supp. 2d 714 (S.D. Miss 2012), *aff'd in part, mod. in part*, 760 F.3d 448 (5th Cir. 2014). Dr. Thorp has also been offered as an expert witness by North Dakota in *MKB Mgt. Corp. v. Stenhejem*, 16 F. Supp. 3d 1059 (D. N.D. 2014), aff'd, 795 F.3d 768, 775 (8th Cir. 2015), defending that state's law prohibiting the abortion of fetuses as early as six weeks into a woman's pregnancy. In that case, the United States Court of Appeals for the Eighth Circuit ruled that law unconstitutional. A petition for writ of certiorari in that case was filed with this Court on November 10, 2015.

Dr. Thorp is thus offered across the country as a witness to defend abortion restrictions. It is therefore critical for courts, including this Court, to exercise their responsibility to independently examine his credibility. Given his "disturbing antipathy towards the accuracy of his testimony," *Strange I*, 33 F. Supp. 3d at 1394, Dr. Thorp's testimony is pseudoscience and should not be used to justify restrictions on the exercise of constitutionally protected rights in any abortion case.

D. Dr. Peter Uhlenberg

Dr. Peter Uhlenberg, a North Carolina sociologist, ROA. 669, was called by Defendants-Appellees, as well as the states of Alabama and Wisconsin, to testify that the plaintiffs were overestimating the problems that doctors who provide abortions in Texas would have in obtaining admitting privileges at local hospitals, as well as the impact this would have on women seeking abortions. ROA. 660-67; *Van Hollen*, 94 F. Supp. 3d at 992 n.46; *Strange I*, 33 F. Supp. 3d at 1395. Dr. Uhlenberg was also offered as an expert witness in the Louisiana case, though he was withdrawn after his deposition. Plaintiffs' Witness List, *June Med. Serv. LLC*, 2015 U.S. Dist. LEXIS 61699. Following a similar pattern as the witnesses described above, Dr. Uhlenberg's testimony was discredited by the district courts in each case in which he testified regarding admitting privileges.

As described, *supra*, Dr. Uhlenberg was one of the many expert witnesses in the case below who was discredited by Judge Yeakel. *Whole Woman's Health*, 46 F. Supp. 3d at 680 n.3. Indeed, despite testifying under oath in this case that he had never discussed the substance of his report with Dr. Rue, ROA. 3327-29, Dr. Uhlenberg's emails demonstrated that not only did Dr. Rue provide ideas, fact changes, and several source files for Dr. Uhlenberg's testimony, ROA. 3328-41, but Dr. Uhlenberg also actively requested Dr. Rue's help in writing his report, stating "I need your critical suggestions." ROA. 3334-35.[19] Emails showed

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[19] *See also* Mary Tuma, *State Witnesses Continue To Show AG's Influence On HB 2 Testimony*, THE AUSTIN CHRONICLE, Aug. 7, 2104, *available at* http://www.austinchronicle.com/daily/news/

Dr. Rue suggested that Dr. Uhlenberg exclude data which contradicted the intended results. ROA. 3339 ("I realize the percent provided in 2012 is down by 1.4 percent from 2011. ... [P]erhaps you could avoid using 2012 data, as it has not yet been uploaded to the DSHS Web site."). Moreover, Dr. Uhlenberg openly admitted his rejection of the scientific method in a book he published yet failed to list on his resume as an expert witness. In it he states that scientific material must be tested against the Bible, and some "findings must be rejected as contrary to a Christian understanding of reality." ROA. 3366.

Judges Thompson and Conley reached similar conclusions. For example, in discrediting Dr. Uhlenberg's testimony that additional travel distance would not impede women who seek abortions, Judge Thompson found that his "opinion was based on news reports on abortion rates, unsophisticated comparisons of abortion rates with the number of abortion providers in Alabama, and statistical analyses with serious methodological flaws." *Strange I*, 33 F. Supp. 3d at 1395; *accord Van Hollen*, 94 F. Supp. 3d at 992 n.46 (placing "little weight" on Dr. Uhlenberg's testimony on the same subject and noting his bias).

III. THIS COURT MUST REJECT THE PSEUDOSCIENTIFIC TESTIMONY PRESENTED TO MANUFACTURE A CONTROVERSY

The Defendants in this case presented a series of witnesses, coordinated by Vincent Rue, who has been repeatedly discredited. He himself has no medical qualifications. Yet Dr. Rue has ghost written

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2014-08-07/state-witnesses-continue-to-show-ags-influence-on-hb-2-testimony/ (last visited December 27, 2015).

testimony for expert witnesses whose qualifications give them credibility, and show experience, in areas where Dr. Rue has none. Texas sought to hide this involvement, and the district court was compelled to require disclosure of the emails between Dr. Rue and his stable of witnesses, exposing what the court below found to be an utterly unacceptable level of involvement of Dr. Rue in the writing of the reports of Dr. Anderson, Dr. Thorp, Dr. Kitz, and Dr. Uhlenberg. As a result, these witnesses were discredited in the eyes of the court. Dr. Thorp, though intended to be offered as a witness at trial, was so apparently discredited by Dr. Rue's involvement as well as his own shortcomings, that the State withdrew him from the case at the last minute.

Such testimony, offered in Texas, and in abortion restriction cases across the country, is nothing but pseudoscience. It seeks to take Dr. Rue's testimony in areas where he has no qualifications, and put it into the mouths of witnesses with some scientific credentials, seeking to add the credibility of scientists to Dr. Rue's non-scientific testimony. It is based not on diligent research relying on the scientific process, but instead on massaged figures seeking to justify preconceived conclusions. Acceptance of such pseudoscience in order to manufacture controversy that does not exist in the scientific community undermines a court's ability to function properly as a defender of the rights guaranteed by the Constitution. In upholding the Western District of Wisconsin's ruling[20] that Wisconsin's similar restrictions on abortion providers

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[20] *Van Hollen*, 94 F. Supp. 3d 949 (Exposing the lack of credibility of many of the same witnesses who testified in defense of Texas' laws, including Vincent Rue, Dr. Anderson, and Dr. Thorp).

were unconstitutional, Judge Richard Posner wrote "[w]e do not agree with the Fifth Circuit that evidence is irrelevant in a constitutional case concerning abortion." *Planned Parenthood of Wis., Inc. v. Schimel*, 2015 U.S. App. LEXIS 20369 at *40 (7th Cir. Nov. 23, 2015). Evidence is indeed not irrelevant, and the evidence provided by the state of Texas failed to meet the standards required by science.

In sum, Texas' array of expert witnesses, and indeed the expert witnesses who have defended these types of restrictions across the nation, have been repeatedly exposed and discredited by federal courts. Reliance on such pseudoscientific testimony is a disservice to the women whose constitutional rights are at stake. The district court below was properly unpersuaded by such testimony.

The Fifth Circuit, however, ignored the fact finding function of the trial court in this case, and chose to ignore the complete absence of scientific credibility displayed by these witnesses, including the outsized role played by Vincent Rue in shaping this evidence despite his lack of qualifications or expertise.

CONCLUSION

This Court should reverse the ruling of the Court of Appeals for the Fifth Circuit, and affirm the decision of the district court, finding that the evidence and testimony advanced by the State is pseudoscientific in nature. Such evidence and testimony fail to demonstrate even a rational relation between the restrictions and the State's legitimate interest in women's health, sufficient to overcome the burden that these restrictions create for women in Texas who are in need of essential and legally protected medical care.

Respectfully submitted,

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APPENDIX

APPENDIX

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